

Remarks of FCC Commissioner Michael O’Rielly
The U.S. Chamber of Commerce’s Telecom and E-Commerce Committee Meeting
November 17, 2014
(As prepared for delivery)

Thank you for the opportunity to speak before this distinguished group. We have been trying to make our respective schedules coincide for quite a number of months and I am pleased we were able to do so today. I thought, if I might, I would touch on a few issues before the Commission that may be of interest to those companies represented here today and then take some questions.

The New Congress

Before I begin, I should probably address the elephant in the room. Not net neutrality. It’s what do we all expect from a new Republican Senate and a Republican House. As someone who worked in that institution until recently, I have some personal frustration not being able to see firsthand the Republican Senate majority tackle our nation’s problems. But I have a good job.

I expect that the new Congress will be very active on communications-related issues. My experiences from the last time Republicans controlled both institutions suggest that considerable time will be spent by the committees of jurisdiction considering how best to modify current law to reflect modern technology and the competitive marketplace or marketplace realities. Call it a rewrite, an update, or just a modernization effort; everything is on the table right now. And, as many of you may recall, the 1996 Telecom Act was passed by a Republican Congress and signed by a democratic president.

I also expect that the new Congress will focus significant time conducting oversight of federal departments and agencies. The deep deference provided to this Administration is probably a thing of the past. That means greater review of the Commission’s internal workings and scrutiny of its decisions. Expect more oversight hearings to allow Members to express their views and examine issues closer. Generally, I welcome their interest in communications policy and see more attention on this important sector of our economy as a positive outcome.

Regulatory Reform

The first issue I wanted to raise with you is the need for regulatory reform. This may seem like a weird topic to address given last week’s development on net neutrality, but bear with me. The Commission’s regulatory paradigm dates back to 1934, reflecting a bygone era of a monopoly telephone company, distinct and separate programming options, and a nascent wireless industry. Even when the Telecommunications Act of 1996 was enacted, the Internet as it is known today did not exist. Let’s face it: technology passed by the FCC’s “silo” structure decades ago.

I applaud the Chamber of Commerce for remaining focused on the need for regulatory reform. There is no wasted effort in persistently reminding regulators of the enormous impact our decisions have on innovation, economic growth, job creation, and the day-to-day operations of America’s businesses.

Some needed regulatory changes may not be possible without Congressional action, either in the form of a Communications Act update or through other bills, such as the Federal Communications Commission Process Reform Act of 2014 or Federal Communications Commission Consolidated Reporting Act of 2013. I leave these decisions to my very-capable friends on Capitol Hill. In the meantime, however, there are steps that the Commission can take to reduce and prevent unnecessary regulatory burdens on industry and provide the market certainty needed for continued innovation and investment in the ICT sector.

First, we must review all our rules and eliminate those that are no longer necessary in light of the vast changes in technology and today's converging and competitive communications marketplace. Going forward, we must show regulatory restraint and act only when there is concrete evidence of market failure. The Commission must resist regulating to prevent future, hypothetical harms that may or may not materialize. We must look at the facts and data before us, as opposed to reacting out of fear of what may possibly occur. Regulation, even if well-meaning, can result in unintended consequences – including dissuading investment, innovation and the next great product or service offering – and increased costs for your businesses; costs that are then transferred to the American consumer.

Second, the Commission must reaffirm our current rules through performing new, rigorous cost-benefit analyses. Marketplace realities have now undermined some of the benefits used to justify our regulations. We must evaluate whether the benefits of our rules still outweigh the burdens. This is where we need your help. Companies – big and small – need to inform us about the burdens of antiquated rules and the benefits that will incur from eliminating certain requirements. Similarly, as I have stated in the past, no new rules should be adopted without a thorough cost-benefit analysis based on verifiable data. Commission records are replete with unsubstantiated, vague information about the benefits of over-reaching regulations, but silent or dismissive when it comes to costs.

Third, the Commission must conclude proceedings as quickly as possible. In my time at the Commission, I have been struck by the length of time it takes to conclude some proceedings. I commend the Chairman's efforts to decrease the backlog and close old dockets, but the Commission must do better. Whether it is in the context of a rulemaking, adjudication or merger review, speed is of the essence to ensure that those regulated are able to timely pursue, as is their right, all of their appellate options before the Commission and the courts. Parties that are involved in extended proceedings or disputes are oftentimes not able to make future business plans and raise needed capital. Frankly, they are frozen in place, waiting for Commission resolution. Drawn out proceedings also undermine market certainty and hinder the flow of investment to the communications sector. U.S. businesses must be provided prompt decisions in order to compete in today's global economy.

Finally, I have recommended that the Commission place draft items on its website when they are circulated in advance of the agenda meeting. This will facilitate informed discussions with interested parties, assist the Commission in coming to the correct result, reduce the chances of our actions having unintended consequences, and increase efficiency of the Commission's processes by saving both time and wasted effort. Imagine if the Chamber's focus and that of its members could be on the actual text of an FCC item, rather than relying on second-hand reports

or bureau meetings to suggest what it may contain. You can call it an increase in transparency, but in reality it's just the right thing to do.

TCPA

Another area that is ripe for review and reform is Telephone Consumer Protection Act, or TCPA. As many of you know, TCPA is a statute enacted in 1991 that governs a number of practices that can range from over-aggressiveness to downright hassling of consumers via the telephone. A portion of it also deals with what have become known as “junk faxes,” a technology that seems to be on the general decline in popularity and usage.

Let me be clear: I do not and will not support bad actors that seek to pummel consumers with marketing efforts or abuse consumers with unfounded attempts at debt collection. But for too many American companies seeking to conduct legitimate marketing or collection efforts, or even to communicate with subscribers or employees, the implementation and enforcement of TCPA has turned into a nightmare. Serious problems with TCPA have been faced by American companies serving every sector of U.S. commercial activity, including health care, education, banking, sports, tech, and consumer services.

I appreciate your deep engagement on this issue. The U.S. Chamber has been outspoken in its defense of companies being targeted by frivolous and detrimental class action lawsuits under the TCPA. It is so important for the agency to hear about the effects of regulatory uncertainty and litigation on American businesses, especially small businesses. It is also helpful to understand how *consumers* are harmed when they cannot receive useful information in a timely manner. It has become evident that the current rules, FCC interpretations, and court decisions are creating situations where consumers might not receive notifications and offers that they want and expect, and are chilling new and innovative services and applications that consumers would find useful. Clear rules of the road that exclude legitimate practices from Commission enforcement would benefit everyone.

I have been pushing within the agency to resolve pending TCPA petitions to provide that clarity. We are starting to take action, but it can be a mixed blessing. And we will continue to need your help to see it through.

As you may be aware, the Commission recently acted on a number of petitions concerning solicited faxes—that is, fax ads sent with the prior express permission of the recipient. Specifically, the Commission granted waivers to petitioners that had not included opt-out notices on solicited faxes. The Commission also envisions granting relief to additional, similarly-situated parties that file waivers in the near-term. That's a good thing, and it is why I was able to support that portion of the item.

However, the Commission also reaffirmed (quite wrongly in my view) that it has statutory authority to require opt-out notices on solicited faxes. That means there will be liability for violating the requirement. Businesses and offices that do not include such notices on all of their faxes could soon find themselves subject to costly litigation. The 11th Circuit recently described the TCPA as a “bounty statute” and that has proven to be true in courts across the nation.

For this reason, I urged staff to conduct outreach to ensure that businesses that don't normally follow FCC proceedings are aware of the rule. Whether or not you agree with me that the Commission didn't have authority to issue the rules, we need to make sure those professionals that still use fax machines, usually small businesses, are fully aware of their obligations and the potential exposure to penalties for non-compliance. I understand that this outreach process is underway, including to the Chamber. I trust that you will further disseminate the news to your members, and perhaps to other organizations you work with that may be interested in the decision.

Still pending, however, are a variety of petitions on the "robocalling" portion of the TCPA. They involve issues such as the definitions of autodialer and capacity, what constitutes consent, who initiates the call, whether and how opt-out is provided for non-telemarketing calls, the treatment of on-demand texts and reassigned numbers. These can be weedy issues but, as your members know, they are generating intense litigation throughout the country.

Indeed, no industry is immune. For example, Twitter is currently subject to a class action lawsuit because it sent text messages to numbers that had belonged to subscribers that signed up to receive texts but, unbeknownst to the company, those numbers had been reassigned to other users. This is problematic for a number of reasons. First, I question whether the TCPA – which was enacted before the advent of text messaging – covers texts. Second, it seems improbable that Twitter used a random or sequential number generator to reach a pre-defined list of subscribers. (And reading capacity to cover any equipment that could be modified to be used in that manner would implausibly turn every smartphone into an autodialer.) Third, imposing strict liability for texting reassigned numbers would create a huge trap for the unwary and chill commercial speech, which the U.S. Supreme Court has reaffirmed is protected under the First Amendment to the U.S. Constitution.

I have made clear that I want to move quickly on these petitions as well. I want to provide as much certainty as we can as soon as possible. While the Commission may need to seek further comment on provisions it has previously interpreted (such as autodialers), I am hopeful that the Commission will rule on issues of first impression, such as reassigned numbers. My goal is to provide as much clarity upfront and leave the NPRM portion for those issues that absolutely require further discussion. The risk inherent in seeking further comment via an NPRM is that for those remaining issues the Commission could lose momentum and final rules could languish, especially when there are so many other high-profile issues the Commission is tackling. Therefore, it will be important for interested organizations such as yours to remain active as the proceeding wears on.

USF/Budget

While the Chamber has been less active on universal service issues, I did want to draw your attention to recent events that could impact your members. As purchasers of communications services, businesses are also contributors to the more than \$8 billion federal universal service fund. Those contributions have been rising to the point that businesses are now paying fees of over 16 percent on their telecom bills. With no overall cap on the Fund, a broken contributions

system, and calls to double the E-rate program and reform the Lifeline program, your businesses could soon be on the hook to foot an even greater bill.

This is not an empty concern. It was reported this morning that the FCC will spend an additional \$1.5 billion a year on E-rate – an increase of 62 percent. This means your companies are about to face higher bills, all at a time when the economy is still trying to get a footing. The FCC estimated that households would pay \$6 more per year, which is an increase of 16 percent. They did not provide an estimate for businesses, but they typically pay a higher proportion. Are your members willing to pay at least 16 percent more for communications services for questionable spending?

I have advocated for an overall cap on the Fund as one means to keep spending in check, but I am one voice among many. Moreover, we seldom hear from the actual consumers and businesses that pay to support universal service. Just as your companies have to set budgets and live within them, so to must the FCC. Therefore, I would encourage you to provide input as the Commission contemplates universal service reforms. And I would be open to any suggestions you may have to push back on this effort.